burse the plaintiff for losses. The defendant should have pleaded performance, or traversed the allegation of embezzlement. A plea that the plaintiff was not damnified when he had alleged the loss of certain moneys, was frivolous. 2 CHITTY PL. (1809 ed.) 481; *Holmes* v. *Rhodes*, 1 Bos. & P. 638-640; *Cutler* v. *Southern*, 1 Saund. 116, note 1; 5 WENTWORTH PL. 490. On demurrer, the whole record is opened, and judgment will be rendered against the party who committed the first fault in pleading. *McDonald* v. *Wilkie*, 13 Ill. 22, 54 Am. Dec. 423; *Hickok* v. *Coates*, 2 Wendell 419, 20 Am. Dec. 632.

SALES—FAILURE TO DELIVER—EFFECT OF COMMERCIAL AGENCY ON REPORTS.—Plaintiff contracted to sell and deliver underwear on credit. After a partial delivery he refused to complete the contract because of an unfavorable report as to defendant's financial standing received from a commercial agency. In an action for the price of the part already delivered, *Held*, that defendant could recoup damages for the breach of the seller's contract. *Kavanaugh* v. *Rosen* (1902), — Mich.—,92 N. W. Rep. 789.

When the buyer on credit becomes insolvent the seller may refuse to perform the contract. MECHEM ON SALES, sec. 1903. Insolvency in this connection means simply "a general inability to pay one's debts, or meet one's financial obligations." MECHEM ON SALES, secs. 1519, 1540, citing *Crummey* v. *Raudenbush*, 55 Minn. 426, 56 N. W. R. 1113; *Tuthill* v. *Skidmore*, 124 N. Y. 148, 26 N. E. R. 348. It need not be actual, but may be simply apparent insolvency. *Diem* v. *Koblitz*, 49 Oh. St. 41, 34 Am. St. 531, 29 N. E. R. 1124. Inability to pay debts as they mature in the ordinary course of business constitutes insolvency, though one's assets be actually greater than his liabilities. MECHEM ON SALES, sec. 1540, citing *Wager* v. *Hall*, 83 U. S. 584; *Bloomingdale* v. *Memphis, etc., R. Co.*, 6 Lea (Tenn.), 616; *Jeffries* v. *Fitchburg R. R.*, 93 Wis. 250, 67 N. W. R. 424, 57 Am. St. R. 919, 33 L. R. A. 351. Clearly a commercial agency report would not justify a refusal to deliver. Nor can the seller delay shipment for a reasonable length of time in order to investigate the buyer's commercial standing. *Oklahoma Vin. Co.* v. *Hamilton* (1902), — Ala. —, 32 S. Rep. 306.

SALES—PARTIAL DELIVERY.—Plaintiff's salesman took an order for jewelry, subject to approval by his employer, in which appeared this clause, "Goods delivered to customer when delivered to transportation company." As an inducement to the purchase, a showcase was to be furnished free. Plaintiff sent no notice of acceptance, but immediately shipped the showcase by freight, and later sent the jewelry by express. Defendant refused to accept the jewelry, which arrived three weeks before the showcase. In an action for the price, *Held*, there could be no recovery. *Price* v. *Engelke* (1903), — N. J. —, 53 Atl. Rep. 698.

The court says that "the contract being entire and indivisible the defendant was not bound to accept any part of the goods unaccompanied by remainder—unless she was notified that the remainder were to be delivered shortly, and not even in that event unless she was given the option to accept conditionally" the part already delivered; that delivery to the carrier must be such as would have been good if made to the vendee personally. The right to refuse a partial delivery is not waived by accepting the part shipped, unless such acceptance is voluntary and made with the knowledge that the shipper does not intend to comply fully with the contract. *Nightingale* v. *Eiseman*, 121 N. Y. 288, 24 N. E. R. 475; MECHEM ON SALES, sec. 1162. When no particular carrier is designated, the shipper may select the usual or customary one for the class of goods ordered. *Robinson* v. *Pogue*, 86 Ala. 257, 5 S. Rep.

685; *Comstock* v. *Affoelter*, 50 Mo. 411; *Putnam* v. *Tillotson*, 13 Met. 517; MECHEM ON SALES, sec. 1182. Ordinarily, no notice of shipment is necessary. MECHEM ON SALES, sec. 740, citing *Bradford* v. *Marbury*, 12 Ala. 520, 46 Am.D. 264. But when delivery is made to different carriers, even though the goods are of such character as to justify the shipper's action, perhaps some notice of such fact may reasonably be required for the vendee's protection. A delivery by installments, under an indivisible contract, is good if both shipments arrive before any objection is made. *Ramsey* v. *Kelsea*, 55 N. J. L. 320, 26 Atl. 907, 22 L. R. A. 415.

SURETYSHIP—OFFICIAL BONDS—LIABILITY FOR ACTS DONE UNDER UNCONSTITUTIONAL STATUTES.—A fiscal county court levied a tax in excess of the constitutional limit. Under this void levy the sheriff collected $3200, which, after the levy had been declared unconstitutional, he refused to pay over to the proper court. In an action against his sureties on his official bond, *Held*, that the sureties were not liable for the amount collected under the void levy. *Commonwealth* v. *Stone* (1903), — Ky. —, 71 S. W. Rep. 428.

The bond in this case was conditioned that he should "pay over to such persons at such times as they may be respectively entitled thereto, all money that may come into his hands as sheriff," and the court places its decision on the ground that the collection of an unconstitutional tax was not a duty imposed on the sheriff by the law and therefore the money so collected was not a liability embraced by the terms of the bond. See *Whaley* v. *Commonwealth* (1901), — Ky. —, 61 S. W. 35. The authorities are agreed that the obligation of the surety is strictissimi juris. *Bank* v. *Ziegler*, 49 Mich. 157. But there is a lack of uniformity respecting the extent of the surety's liability on an official bond for the principal's wrong. The weight of authority is that the liability extends to acts done both *colore officii* and *virtute officii*. MECHEM, PUBLIC OFFICERS, secs. 283 and 284. The principal case seems to be analogous to those cases where the officer acts without any writ whatever and the cases generally support the doctrine that under such circumstances the sureties are not liable for his wrong. *McLendon* v. *State*, 92 Tenn. 520, 21 L. R. A. 738 distinguishes this class of cases from those where there is a valid writ but a wrongful attachment as in *Lammon* v. *Feusier*, 111 U. S. 17.

TRADE-MARKS—RIGHT TO PROTECTION—DECEPTIVE USE AS BAR TO RELIEF.—For a number of years complainant has been advertising and vending a medical preparation known as "Syrup of Figs," and claims trade-mark rights therein. Defendant placed upon the market a medical compound resembling complainant's preparation, under the identical name "Syrup of Figs." Bill in equity for an injunction restraining defendant from using such name, and for an accounting for gains and profits. It was shown in defense that complainant's preparation contained in fact practically none of the juice of the fig. It was therefor contended that complainants were themselves perpetrating a fraud on the public. *Held*, that complainant can not have relief. *Worden & Co.* v. *California Fig Syrup Co.* (1903), — U. S. —, 23 Sup. Ct. R. 161.

The court found that complainant and appellee had so fraudulently represented to the public the nature of the preparation which they were selling under the name "Syrup of Figs," that a court of equity would not protect them in the use of that name. The decree of the circuit court of appeals was therfore reversed. It is well settled that a trade-mark that in itself is fraudulent and deceptive, will not be protected. *Palmer* v. *Harris*, 60 Penn. St. 156; *Joseph* v. *Macowsky*, 96 Cal. 518, 19 L. R. A. 53; *Leather Cloth Co.* v.